Supreme Court, U.S.
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No. 97-1667

In The

Supreme Court of the United States

October Term, 1997

JAMES E. POWELL, et al.,

Petitioners,

v.

THE STATE OF FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY

The State does not deny that the Questions Presented are important questions of federal statutory and constitutional law that should be settled by the Court. Nor does the State deny that it benefits monetarily from the special exceptions accorded public sector employers in the 1985 FLSA amendments. Instead, it claims three of the five questions are not properly presented.

A. Questions (2) & (5) Address Duties Of Federal Courts Faced With Motions To Dismiss On Eleventh Amendment Grounds.

According to the State, Question (2) is hypothetical and merely seeks an advisory opinion on whether state sovereign immunity bars actions for unpaid FLSA wages in Florida's state courts. This mischaracterizes the question which actually asks: "May a federal district court dismiss employees' FLSA action on Eleventh Amendment grounds, if the State-employer refuses to consent to suit in its own courts for FLSA claims, and its courts deem the sovereign immunity defense a jurisdictional bar?"

It addresses duties of federal courts. In essence, it asks whether a district court may dismiss a federal question case without reaching the merits, unless it is clear that an alternative forum is available and will hear the case.

This is neither hypothetical, nor a new concept. For example, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court reaffirmed that before a federal court dismisses a case on the grounds of *forum non conveniens*, it must first

determine whether there is an adequate alternative forum available to the plaintiff, and may not dismiss if "the alternative forum does not permit litigation of the subject matter of the dispute." *Id.* at n. 22 (citing *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978) (court refusing to dismiss where unclear whether alternative forum will hear case)).

Indeed, *Piper* suggested that when in doubt, the district court might condition dismissal on defendant's agreement to waive objections it could have raised in the alternative forum. *Id.* n.25. *See also Mississippi v. Louisiana*, 506 U.S. 73 (1992) (Court must first explore availability of alternative forum before declining exercise of original jurisdiction).

The district court here did neither – no dismissal only on condition that the State waive its state law sovereign immunity; no assurance that Florida's state courts will accept jurisdiction of a federal question case over the State's refusal to consent to it and its assertion of sovereign immunity to bar jurisdiction.[1] It is appropriate to ask the Court to review the propriety of dismissal under these circumstances.

The State scoffs at the role of the Supremacy Clause in these circumstances. But, if a state refuses to choose a federal or state forum for FLSA claims against it, then the

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[1] Currently, there is no decision that unambiguously holds a state court *must* hear a federal question case despite its State's invocation of a sovereign immunity bar. Decisions to date have been against private parties, or local governments rather than the state itself, or have rested on the state court's discrimination against federal rights of action.

federal court acting pursuant to the Supremacy Clause, should impose the federal forum over the state's Eleventh Amendment objections. The Eleventh Amendment did not repeal the Supremacy Clause.

Rather, the Supremacy Clause gives Congress power to impose its will on the States as long as it acts within the powers granted to it under the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This must include the power to enforce a valid federal law in federal courts if the state refuses to allow suits in its own courts.

This is similar to the concept of "cooperative federalism" recognized in *New York v. U.S.*, 505 U.S. 144, 167, 173-174 (1992): "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." (Citations omitted). Florida does not have its own minimum wage and maximum hour laws.

The State also proposes that Petitioners should have first *refiled* this case, suffered statute of limitations problems, and lost an appeal of the question in Florida's courts, before petitioning this Court for review. This would impose untenable risks on employees who have a statutory right to be heard. There is no requirement in the law that Petitioners refile in state court and suffer rejection there first (perhaps after years of litigation and appeals), before asking this Court to review the propriety of their dismissal from federal court.

The risks of refiling in state court are considerable since the FLSA empowers state courts to entertain suits

arising under it, but does not require them to do so – it does not "force a duty upon such courts as against a valid excuse". *Douglas v. New York*, 279 U.S. 377, 387-388 (1929) (citations omitted) (discussing Employers' Liability Act which gives concurrent jurisdiction to federal and state courts).

With respect to Question (5), it is quite apparent that the district court intentionally delayed and then declined to decide the opt-in motion (and did not enforce its own order that the State respond to it), because of the Eleventh Amendment defense. It ruled on motions filed after the opt-in motion.

B. Injunctive Relief For State Employees

1. Injunctive relief is not "exclusive" to the Secretary because employees have an express right to seek it. The State claims the Secretary has the "exclusive" right to bring all actions for injunctive relief. The text of the FLSA does not support this.

First, it cannot be said that the Secretary has the "exclusive right" to seek injunctive relief, when 29 U.S.C. § 216(b) *expressly* gives employees the right to seek equitable relief on their own, unless and until the Secretary intervenes. If the Secretary does not intervene under § 217, employees have an unqualified right to bring and maintain an action for both legal and equitable relief under § 216(b). This is significant because it indicates Congress was not opposed to employees seeking and receiving injunctive relief on their own.

Second, the full quote of this portion of § 211(a) states, "the Administrator shall bring all actions under section 17 to restrain violations of this Act." This language means the Secretary must proceed, *if at all*, under § 217 – she cannot proceed under § 216(b). The language does not prevent employees from suing under § 216(b). Nor does the language prohibit employees from seeking enforcement by injunction, of the regulations impiementing 29 U.S.C. § 213(a)(1).[2]

2. State Employees awarded *Ex parte Young* relief would receive far less than the FLSA gives all other public and private employees. The State also claims that if state employees were permitted relief under *Ex parte Young*, 209 U.S. 123 (1908), they would be getting a "broader remedy than Congress intended." Opp. p. 9. The opposite is true. State employees would be receiving far *less* than all other public and private sector employees who are eligible for two to three years of back wages, plus liquidated damages, plus an end to the violations.

Because the Eleventh Amendment is available only to states, the *Young* exception should be available to state employees who are the only ones affected by such a defense. While the court declined *Young* relief to the plaintiffs in *Seminole*, 517 U.S. 44, 116 S.Ct. 1114, 1132-1133 (1996), it did so only because the statute would be superfluous if plaintiffs could substitute *Young* and obtain the full remedial powers of the federal court, thus

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[2] Indeed, the only regulations mentioned in § 217 for which the Secretary may seek restraint, are those under § 214 which is limited to students, apprentices, and handicapped workers. No mention is made of the executive regulations under § 213(a)(1).

giving them more complete and immediate relief than provided for in the statute itself. This is not a danger here.

C. Question (4) Presents A Question Of Federal Law Based Upon A Legislative Record That Shows The National Political Process Worked.

The State claims Question (4) is improper because there is no record evidence proving all states helped draft the 1985 FLSA amendments or that Florida acted to waive its Eleventh Amendment immunity to FLSA suits in federal courts. On the contrary, it is a question of law based upon available legislative history.

Moreover, its argument misses the point. The State does not claim the national political process operated in a "defective manner", or that it was somehow precluded from participating in it, or that the process was inadequate to protect it.[3] This is the test under *Garcia*, 469 U.S. 528, 556 (1985), *South Carolina v. Baker*, 485 U.S. 506, 513 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 464, 477 (1991). The test is not whether each state individually chose to participate.

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[3] Notably, the State never alleges that it did not participate in some fashion (by letter or lobby). In any event, the National Conference of State Legislatures and National Association of State Personnel Directors actively lobbied on behalf of the states. 1985 U.S. Code Cong. & Admin. News 651, 657 (1985).

D. FLSA Has Applied To States For More Than Thirty Years.

The State claims there is no established tradition of enforcing FLSA claims against states in federal courts because such cases only span 1993 to 1994. In doing so, it overlooked (among other cases) the 1991 decision against it in *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991), and *Maryland v. Wirtz*, 392 U.S. 183 (1968), which was an FLSA case against a state.

It also misconstrues the significance of the history of the FLSA. The FLSA was enacted sixty years ago. For more than thirty of those sixty years the FLSA applied to states' non-traditional functions, and from 1986 to the present, it has applied to *all* state functions. Moreover, once Congress amended the FLSA in 1974 to correct the deficiencies to abrogation noted in *Employees v. Missouri*, 411 U.S. 279 (1973), under prevailing law (prior to *Seminole*) this clear statement of intent by Congress was sufficient to render states suable for FLSA claims in federal courts.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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